

FEDERAL COMMUNICATIONS COMMISSION

**Federal Communications Commission**

**FCC 00-245**

JUL 21 5 47 PM '00

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In re	)	
	)	
GERARD A. TURRO	)	MM Docket No. <u>97-122</u>
	)	
For Renewal of License	)	File Nos. BRFT-970129YC
for FM Translator Stations	)	BRFT-970129YD
W276AQ(FM), Fort Lee, NJ, and	)	
W232AL(FM), Pomona, NY	)	
	)	
MONTICELLO MOUNTAINTOP	)	
BROADCASTING, INC.	)	
	)	
Order to Show Cause Why the	)	
Construction Permit for FM Radio	)	
Station WJUX(FM), Monticello, NY,	)	
Should Not Be Revoked	)	

**Appearances**

Charles R. Naftalin and Alan Y. Naftalin on behalf of Gerard A. Turro; James P. Riley and Andrew S. Kersting on behalf of Monticello Mountaintop Broadcasting, Inc; Michael D. Hays, John S. Logan, Richard A. Helmick, Roy R. Russo and J. Brian DeBoice on behalf of Universal Broadcasting of New York, Inc.; and James W. Shook and Alan E. Aronowitz on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

**DECISION**

Adopted: July 6, 2000

; Released: July 20, 2000

By the Commission: Chairman Kennard not participating.

1. In this Decision the Commission affirms the Initial Decision ("I.D."), 15 FCC Rcd 560 (ALJ 1999), of Administrative Law Judge Arthur I. Steinberg ("ALJ"), which granted the applications of Gerard A. Turro for renewal of license for FM translator stations W276AQ(FM), Fort Lee, New Jersey, and W232AL(FM), Pomona, New York,<sup>1</sup> and concluded that the

<sup>1</sup> FM translators are stations that receive the signals of FM radio stations (referred to as "primary stations") and simultaneously retransmit those signals on another frequency. In general, the signal of the FM radio station being rebroadcast must be received directly over-the-air at the

construction permit of Monticello Mountaintop Broadcasting, Inc. ("Monticello") for FM radio station WJUX(FM), Monticello, New York, should not be revoked.

## I. BACKGROUND

2. Turro has been the licensee of the Fort Lee translator since March 1986 and the Pomona translator since January 1995. From September 1993 to July 1995, he was also the licensee of Intercity Microwave Relay Station WMG-499. Turro also owns a business called FM 103.1, Inc., doing business as Jukebox Radio ("Jukebox Radio"), located in Dumont, New Jersey, which produces radio programming consisting of music of the 1940s and 1950s. The Fort Lee translator and the Jukebox Radio studio are both located in Bergen County, New Jersey, Turro's place of residence. On two separate occasions, Turro sought waiver or amendment of the Commission's rules to permit program origination on his Fort Lee translator. Both requests were denied. See Gerard A. Turro, 2 FCC Rcd 6674 (1987), aff'd, Turro v. FCC, 859 F.2d 1498 (D.C. Cir. 1988); Report and Order, FM Translator Stations, 5 FCC Rcd 7212, 7219-20 (1990), recon. denied and clarified, 8 FCC Rcd 5093 (1993).<sup>2</sup>

3. In January 1991, Turro requested a "declaratory ruling" from the Mass Media Bureau "concerning the operation of commercial FM translators." Specifically Turro asked whether it would be permissible for an FM translator station to purchase air time on the FM station that it rebroadcasts where: (a) the translator operates outside the primary contour of the originating station; (b) the primary station does not reimburse the translator for air time or financially support it; (c) the translator complies with the Commission's rules regarding the purchase of brokered air time; and (d) the translator may sell advertising during the brokered time. Bureau Exh. 1, p. 6.

4. In a letter dated November 19, 1991, the Bureau responded that Turro's time brokerage "proposal would [not] be prohibited by the Commission's rules or policies." In pertinent part, the Bureau stated:

[T]he issue presented by Mr. Turro's request is whether the licensee of a translator station is permitted to enter into a time brokerage contractual arrangement with its primary station, provided that the primary station does not either reimburse the translator station licensee for the purchase of the brokered time or provide financial support for the translator station's operation.

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translator site. The Commission authorized FM translators in order to provide FM service to areas that were unable to receive satisfactory FM reception. See FM Translator Stations, 8 FCC Rcd 5093 (1993).

<sup>2</sup> In FM Translator Stations, the Commission restructured the FM translator rules consistent with their intended purpose of providing supplementary service to areas having unsatisfactory FM reception. In comments filed in that proceeding, Turro requested amendment of the rules to permit translator stations serving counties with no FM allocations to originate programming.

Under § 74.1232(e), an FM translator station whose coverage contour extends beyond the protected contour of the primary station cannot receive any support, before or after construction, either directly or indirectly, from the primary station. This applies to all persons and entities having any interest or connection with the primary station.

With regard to brokerage arrangements between licensees and brokers, such arrangements usually involve the broker as both program producer and commercial salesperson for a time block purchased from the licensee. Our rules only require licensees to keep brokerage contracts at the station and make them available for Commission inspection upon request (47 C.F.R. § 73.3613(d) (1989)).

In view of the specific circumstances presented by Mr. Turro's request, we conclude that his proposed operation would be consistent with the Commission's rules and policies as outlined above. However, this conclusion rests on the following requirements: the time brokerage contract must be kept at the primary station and made available for Commission inspection upon request per § 73.3613(d); there must be a bona fide, arm[']s-length transaction between the primary station and the translator; the licensee of the translator station will have to pay the primary station a rate charge comparable to the amount charged other purchasers of brokered airtime, or an amount consistent with such charges in the local broadcast community; and at no time would the translator station receive financial support, directly or indirectly, from the primary station to cover any costs associated with the operation and maintenance of the translator station.

Bureau Exh. 1, pp. 8-9.

5. After receiving the Bureau's ruling, Turro began exploring ways to form such an arrangement to bring FM programming to Bergen County. On October 17, 1994, Turro and Wesley R. Weis, the sole owner of Monticello, the permittee of WJUX(FM), entered into a Network Affiliation Agreement. The Agreement provided that Turro would provide Jukebox Radio programming to WJUX twenty-four hours a day, seven days a week, and that Turro would compensate Monticello for carrying the programming on WJUX. The parties also agreed that the Fort Lee and Pomona translators would rebroadcast WJUX's signal.

6. In February 1995, Universal Broadcasting of New York, Inc. ("Universal"), the licensee of AM station WVNJ, Oakland, New Jersey, complained to the Commission that Turro and Weis were violating the Commission's rules. Inter alia, Universal alleged that Turro was not receiving the WJUX signal off the air and rebroadcasting it via his translator stations, but was sending Jukebox Radio programming directly from his Dumont studio facilities to the Fort Lee translator over his microwave relay station, WMG-499. As a result of the allegations, the Commission conducted an investigation, including inspections by an FCC field engineer of the respective facilities on April 13 and 14, and May 15, 1995. Following the inspections, the Bureau sent Letters

of Inquiry to Turro and Monticello, and they responded.

7. Based upon the responses to the Letters of Inquiry and the results of the field inspections, the Commission determined that serious questions existed regarding Turro's and Monticello's basic qualifications. Because of the commonality of facts and issues involving the respective stations, the Commission made Turro and Monticello parties to a consolidated proceeding. By Hearing Designation Order, Order to Show Cause and Notice of Opportunity for Hearing, 12 FCC Rcd 6264 (1997) ("HDO"), the Commission specified issues to determine:

(a) whether Turro's operation of his translator stations violated Sections 74.531(c) and 74.1231(b) of the Commission's rules, 47 C.F.R. §§ 74.531(c) and 74.1231(b), with respect to the operation of translator stations;

(b) whether Monticello has violated and/or continues to violate Sections 73.1120 and 73.1125(a) and (c) of the Commission's rules, 47 C.F.R. §§ 73.1120 and 73.1125(a) and (c), with respect to the maintenance of a main studio for WJUX(FM);

(c) whether Turro engaged in an unauthorized transfer of control, or otherwise exercised and/or continues to exercise *de facto* control over WJUX(FM), in violation of Section 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 310(d), and Section 73.3540(a) of the Commission's rules, 47 C.F.R. § 73.3540(a);

(d) whether Monticello engaged in an unauthorized transfer of control or otherwise abdicated control of WJUX(FM) to Turro or an affiliated entity in violation of Section 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 310(d), and Section 73.3540(a) of the Commission's rules, 47 C.F.R. § 73.3540(a);

(e) whether Turro misrepresented and/or lacked candor to the Commission concerning the operation of his translator stations;

(f) whether Monticello and/or its agents misrepresented and/or lacked candor to the Commission concerning the operation of WJUX(FM).

The ultimate issues set for hearing were to determine whether Turro's renewal applications should be granted and whether Monticello is qualified to be or remain a Commission broadcast permittee. Pursuant to Section 309(e) of the Act, 47 U.S.C. § 309(e), the burden of proof on the issues pertaining to Turro's qualifications was assigned to the licensee and, pursuant to Section 312(d) of the Act, 47 U.S.C. § 312(d), the burden of proof on the issues going to Monticello's qualifications was placed on the Bureau. The HDO also called for a determination, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), of whether an order of forfeiture in an amount not to exceed \$250,000 should be issued against Turro and/or Monticello for each of the alleged violations which occurred or continued within the applicable statute of limitations. Finally, the HDO made Universal a party

to the proceeding.

8. In the I.D., the ALJ concluded that: (a) Turro's operation of his translators was in compliance with 47 C.F.R. § 74.1231(b), but that his operation of his relay station, WMG-499, was in violation of 47 C.F.R. § 74.531(c), and that any forfeiture for this violation was precluded by the statute of limitations; (b) Monticello briefly violated 47 C.F.R. § 73.1125(c) in a minor respect, but that no sanction was warranted for this violation, and that Monticello otherwise was in compliance with the main studio rules; (c) there was no unauthorized transfer or abdication of control of WJUX; and (d) neither Turro nor Monticello intentionally misrepresented facts or lacked candor with the Commission. The ALJ ultimately concluded that Turro's renewal applications for his translator stations should be granted, and that there was no basis for revocation of Monticello's construction permit for WJUX.

9. Universal excepts to the I.D. and urges reversal. The Bureau also excepts and argues that the I.D. should have denied Turro's renewal applications and revoked Monticello's construction permit, or alternatively, imposed forfeitures. Turro and Monticello support affirmance of the I.D. in all respects. Universal also requests oral argument.<sup>3</sup> This request is denied. We believe that the pleadings and the record below provide an adequate basis for decision and that oral argument would not materially assist our resolution of this proceeding.

## II. UNAUTHORIZED TRANSFER OF CONTROL ISSUES

### A. Findings

10. Weis and Turro have known each other for some twenty years. At one time Weis, who had worked in various businesses in the radio industry for many years, had an interest in the Pomona translator, and, since December 1986, Weis has also owned the building where Jukebox Radio is located. I.D., ¶¶ 9-10. In the summer of 1994 Turro informed Weis that Larry Fishman, who held the construction permit for an FM station in Monticello, New York, was interested in selling the permit. Turro thought Weis might want to own a station because of his past broadcast experience. Subsequently Turro told Weis of the Bureau's 1991 letter, and Turro proposed that Weis acquire the FM permit and that Turro supply Jukebox Radio programming and commercial advertising for the station. Id. at ¶¶ 17-18. After several meetings with Fishman, Weis agreed to

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<sup>3</sup> The pleadings before us are: (a) Exceptions to Initial Decision of Universal; (b) Bureau's Exceptions to Initial Decision; (c) Reply of Turro to Exceptions; (d) Reply to Exceptions filed by Monticello; (e) Motion for Expedited Processing filed by Universal; (f) Renewed Petition for Extraordinary Relief and Issuance of an Order Requiring Turro to Come into Immediate Compliance with 47 C.F.R. § 74.1232 filed by Universal; (g) Supplement to Petition to Deny and Post-Hearing Statement of Position of Universal; (h) Bureau's Opposition to Renewed Petition for Extraordinary Relief; (i) Opposition to Renewed Petition for Extraordinary Relief by Monticello; (j) Opposition of Turro to Renewed Petition for Extraordinary Relief; and (k) Consolidated Reply to Oppositions to Renewed Petition for Extraordinary Relief filed by Universal.

purchase the permit for \$120,000, which included \$40,000 at closing and a note for the \$80,000 balance. Turro and Weis also discussed an arrangement that would be consistent with the Bureau's 1991 letter. They agreed that Jukebox Radio would make monthly payments to Monticello in consideration for which Monticello would provide air time on the FM station, and that the station's signal would be rebroadcast by the Fort Lee and Pomona translators. Id. at ¶¶ 19-21.

11. On October 17, 1994, Turro and Weis entered into the Network Affiliation Agreement, a copy of which was available at WJUX's main studio. Id. at ¶ 74. The understanding was structured as a network affiliation agreement on the advice of counsel because Turro told counsel he intended to provide programming to other stations. The Agreement provided that Jukebox Radio would provide Monticello with programming "via satellite, phone lines, or other suitable means" twenty-four hours a day, seven days a week, 365 days a year, and would provide all local station identifications, public affairs programming, and EBS tests. Jukebox Radio also agreed to abide by all FCC rules governing program content and to indemnify Monticello against any forfeitures imposed by the FCC. The parties also agreed to abide by all applicable FCC rules and regulations. The Agreement also provided that the Fort Lee translator could rebroadcast the FM signal. Both Weis and Turro believed that the Agreement was consistent with the Bureau's 1991 letter authorizing a translator station to act as a time broker. Id. at ¶¶ 22-23, 31; Bureau Exh. 11, p. 217.

12. In order to induce Monticello to enter into the Agreement, Turro on the same day signed a Guaranty of Payment, whereby he personally guaranteed all payments from Jukebox Radio to Monticello during the life of the Agreement up to \$400,000. Weis stated that he suggested the Guaranty because of the possibility that Turro's operation could go out of business. Jukebox Radio also paid Monticello \$40,000, a figure Weis came up with, as an additional incentive for entering into the Agreement. Id., ¶¶ 24-25.

13. On July 17, 1995, Turro and Weis signed an Amendment to Network Affiliation Agreement. The Amendment provided that Monticello retained responsibility for ascertaining community needs, that Monticello had the right to broadcast programming other than Jukebox Radio programming, that Monticello could delete, preempt, or substitute for Jukebox Radio programming, and that Monticello's acceptance and broadcast of Jukebox Radio programming was subject to its responsibility to comply with all FCC regulations. The Amendment stated that it was "retroactive to the commencement of the Agreement." Turro and Weis testified that the Amendment was agreed to in November 1994, but not signed until July 1995. The Agreement was amended on the advice of counsel. Its purpose, according to Weis, was to clarify the Agreement to reflect Monticello's obligations to the Commission. Monticello substituted or preempted Jukebox Radio programming on two occasions, once in 1995 when the program feed went out, and once in 1997 when political commercials were broadcast. Id. at ¶ 32-34.

14. Monticello acquired the FM permit from Fishman on October 18, 1994.<sup>4</sup> At that time, Monticello entered into a tower lease, as well as a lease for studio and office space in Ferndale,

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<sup>4</sup> The station's call sign was then WXTM(FM). It was not formally changed to WJUX(FM) until April 14, 1995. Id., ¶ 9 n. 2; ¶ 45. For ease of reference, we use WJUX throughout this opinion.

New York, with Mountain Broadcasting Corporation ("MBC"). MBC was the licensee of WVOS(AM) and WVOS(FM) ("WVOS"), Liberty, New York, and its offices were also located in the Ferndale building. Weis hired Eugene Blabey, who was the general manager of the WVOS stations and an owner of MBS, to be the general manager of WJUX. On October 21, 1994, the new station went on the air. Weis stated that all of the equipment was available and the station was built in two days. On November 30, 1994, Turro informed the Bureau that the Fort Lee translator had begun rebroadcasting the primary station. Id. at ¶ 35-38, 41, 45.

15. It was decided that Turro would become chief operator for the station, in which capacity he provided technical support from October 1994 until August 1995. He was not paid for this role, and it took up little of his time. Turro stated that he provided general assistance in starting up the station but did not build the facilities. Primarily he installed his Jukebox Radio audio equipment and tested to see that it worked. He also inspected the WJUX main studio equipment and verified that it was working. Turro stated that Weis was present during the construction process and directed the construction crew. Id. at ¶ 42-43.

16. Two weeks prior to the time WJUX went on the air, there was a discussion of the need for Weis to divest his interest in the Pomona translator station. Weis understood that he could not own both a translator and an FM station where the translator operated outside the primary contour of the station being rebroadcast. On January 10, 1995, Weis transferred his interest in the Pomona translator to Turro pursuant to Commission approval. Soon thereafter the Pomona translator began rebroadcasting the signal of WJUX. Id. ¶ 44-45.

17. With respect to the station's finances, Weis testified that he alone exercised financial control over WJUX. He stated that Turro never guaranteed any debt incurred by Monticello or Monticello's performance of any contract or lease. Monticello paid the balance due Fishman for the purchase of the permit, made the lease payments for its transmitter site and main studio, and paid the compensation for all persons it employed at WJUX. It also paid the bills for services, products, and utilities used for the station. Weis wrote the checks to construct the station, pay the staff, and meet the station's operating expenses. He also signed personal guarantees in connection with Monticello's lease of its transmitter site and office and studio space from MBC. And Turro testified that he never had financial control over or responsibility for WJUX. Id. at ¶ 46-47.

18. Weis testified that he also exercised responsibility over the personnel of the FM station, including hiring Blabey as general manager, Carol Montana as public affairs director and general staff support person, and George Spicka to perform part-time engineering services. The latter two were hired at Blabey's recommendation. Weis also hired Alan Kirschner, the station's current chief operator, who replaced Turro in this position in August 1995. Weis agreed to pay Blabey \$100 a week to act as general manager. Later Blabey also entered an agreement with Weis with respect to advertising sales. Because Blabey was an owner of WVOS, he performed services for that station that were different from those he performed for WJUX. Blabey had only occasional contact with Jukebox Radio. Id. at ¶¶ 49-51; tr. 937-38. Blabey introduced Montana to Weis, and when she was hired in October 1994, she entered into a letter agreement with Weis regarding her employment. Her starting salary was \$100 a month and was later raised by Weis at Blabey's recommendation.

She met with Weis on WJUX business on an as-needed basis, and Blabey also gave her directions regarding WJUX programming, including directing her to send a "bulletin board" of PSAs to Jukebox Radio. I.D., ¶¶ 52-53.

19. Weis also stated that he exercised ultimate authority over WJUX's programming. Weis understood when he acquired the station and when he agreed with Turro to the time brokerage arrangement that Jukebox Radio would provide popular music, including music of the big band era, that would appeal to residents of Sullivan County, New York, where the community of Monticello is located. When WJUX began operations, Weis also directed that the station carry public service and public affairs programming designed to serve Monticello and Sullivan County. Specifically Weis had discussions with Blabey which resulted in the public affairs programs produced by Blabey and aired on WVOX being rebroadcast over WJUX on different days and at different times than WVOX carried them. This accomplished providing this programming to a potentially different audience in Sullivan County. Turro stated that when Weis and Blabey arranged for public affairs programming to be broadcast on WJUX, he decided to carry that programming on Jukebox Radio. Id. at ¶¶ 54-55.

20. A weekly program called "People Who Make a Difference," which focused on the activities of Sullivan County residents who had a positive influence on their community, was produced at WJUX's main studio and broadcast beginning in February 1995. Both WJUX and WVOX carried the program. Blabey also sent tapes of the programs to Jukebox Radio for broadcast. Another program, called "Open Mike," which provided a forum for community leaders to answer questions from listeners, was originally broadcast on WVOX and later rebroadcast on WJUX. Blabey sent tapes of the program to Jukebox Radio and it was broadcast on WJUX on a tape-delayed basis. This program was broadcast on WJUX beginning at least as early as May 1996. Id. at ¶¶ 56-57.

21. Between October 1994 and October 1995, WJUX only broadcast programs directed at Sullivan County residents that were also carried at different times on WVOX. During this same time period, however, WJUX broadcast PSAs that were not carried on WVOX. Weis had discussions with Blabey which resulted in the broadcast by WJUX of PSAs that Weis believed were of interest to the community of Monticello and Sullivan County. It was Montana's job at WJUX to gather material for PSAs, compile a bulletin board of prospective PSAs, and forward it to Jukebox Radio for broadcast over WJUX. She designated on the bulletin board, or informed Jukebox Radio regarding, PSAs of particular importance that should be aired. Although Jukebox Radio made the determination as to which PSAs to produce and air, it followed her suggestions in almost every instance. Id. at ¶¶ 58-59.

22. Turro stated that Jukebox Radio had discretion to reject public affairs programming from WJUX produced by Blabey or PSAs received from Montana. If it did so, however, WJUX had the right to delete Jukebox Radio programming and place the PSAs and public affairs programs on the air directly at WJUX. Blabey also put emergency announcements regarding Sullivan County on WJUX. During a snow storm, when he was informed by the Sullivan County Manager that the roads were being closed, Blabey told Jukebox Radio that he had an emergency message to air on



WJUX, prepared the message, and sent it to the Dumont studio to be originated. Id. at ¶¶ 60-61.

### **B. ALJ Conclusions**

23. The ALJ found no basis for concluding that Weis, Turro, or any entity owned by Turro, engaged in an unauthorized transfer of control of WJUX in violation of 47 U.S.C. § 310(d). The ALJ noted that, while there is no exact formula by which control may be determined, the Commission looks beyond mere legal title and focuses on the factors of finances, personnel, and programming in order to ascertain whether a transfer of control has occurred.

24. Applying these factors, the ALJ concluded that Weis was in sole control of the finances of Monticello and WJUX at all times. He found that Weis alone was responsible for the station's financial obligations and that Jukebox Radio's monthly payments were typical of time brokerage arrangements. He also found that Weis's insistence on an inducement payment and a personal guarantee in order to enter into the Network Affiliation Agreement with Turro were consistent with his control. The ALJ also found that Weis was in ultimate supervisory control of WJUX's programming. Weis exercised this control, the ALJ stated, by substituting public affairs programming for Jukebox Radio programming, in keeping with the terms of the Amendment to Network Affiliation Agreement. The ALJ also found that Turro's sale of most or all of WJUX's commercial time was typical of all time brokerage arrangements. Finally the ALJ concluded that Weis also exercised supervisory control over the station's personnel. Weis hired or approved of the hiring of the station's employees, and Turro was uninvolved in these decisions. In the ALJ's view, Turro's limited role as chief operator of the station did not establish any transfer to him of ultimate decision-making authority.

### **C. Exceptions**

25. Universal argues that Weis abdicated control of WJUX and Turro assumed control of the station from the outset. In general, Universal argues that the ALJ erred because his analysis did not focus on the methods of operation of Turro and Weis prior to April 13, 1995, the date on which the Commission first inspected the subject facilities. With respect to finances, Universal asserts that Turro's relationship with Weis went beyond that of a traditional time broker and resulted in Turro being the source of all of WJUX's revenue and assuming all the risk. Universal states that Turro induced Weis to purchase the station permit and bankrolled the transaction by providing the down payment, the station income, guaranteeing payments, and indemnifying Weis against FCC forfeitures. With regard to programming, Universal contends that the unamended Network Affiliation Agreement transferred control to Turro because it did not give Weis the right to preempt programming. As for WJUX's personnel, Universal alleges that Blabey and Montana followed Turro's instructions during the Commission inspection of WJUX, and that their roles were ministerial compared to Turro's responsibilities at the station.

26. Echoing Universal's exceptions, the Bureau asserts that the ALJ erred by ignoring the history leading up to the construction of WJUX, by unduly emphasizing the individual aspects of control and not considering the totality of the circumstances, and by unreasonably relying on

ameliorative steps taken by Turro and Weis only after their arrangement had come under scrutiny. The Bureau contends that Weis would not have purchased the station permit but for Turro's financial and other assistance and, furthermore, that Turro's payments to Monticello after the station was constructed, under the Network Affiliation Agreement, meant that WJUX's existence was totally dependent on Turro. As to station personnel, the Bureau states, the ALJ did not sufficiently consider Turro's role as chief operator of the station. In addition, the Bureau asserts, Turro, not Monticello, controlled programming, sales of commercial time, remote control of WJUX's transmitter, and the main studio telephone. With regard to programming, the Bureau argues that the Amendment giving Monticello the right to preempt Jukebox Radio programming was not executed until well after WJUX was inspected by the FCC, the Bureau had sent letters of inquiry to Weis and Turro, and the latter were aware that the legality of their operation was under review.

27. Turro replies that Monticello was in control of WJUX's finances, personnel, and operations, including essential aspects of the station's programming obligations, and was also legally responsible for the operations of WJUX. Monticello argues that, although it and Turro have had an ongoing business relationship through their Network Affiliation Agreement, it always maintained ultimate decision-making authority over WJUX and did not engage in an unauthorized transfer of control of the station in violation of 47 U.S.C. § 310(d).

#### **D. Discussion**

28. These issues were specified to determine whether Turro and/or Monticello engaged in an unauthorized transfer or abdication of control of WJUX from Monticello to Turro. In assessing where control of a broadcast station resides, the Commission does not apply a litmus test, but rather, it generally looks to determine who has authority over the basic operational policies of the station. In making this determination, we focus specifically on the areas of programming, personnel, and finances. See Southwest Texas Broadcasting Council, 85 FCC 2d 713, 715 (1981); Stereo Broadcasters, Inc., 87 FCC 2d 87 (1981), recon. denied, 50 R.R. 2d 1346 (1982); Bennett Gilbert Gaines, 8 FCC Rcd 1405 (Rev. Bd. 1993), rev. denied, 9 FCC Rcd 533 (1994). We have stated that a licensee's involvement in a time brokerage agreement does not per se constitute an unauthorized transfer of control, and indeed we apply the same traditional tripartite standard in such a case as we do in any other case to ascertain who mandates basic policies governing fundamental station operations. See WGPR, Inc., 10 FCC Rcd 8140, 8141-42 (1995); Cosmopolitan Broadcasting Corp., 59 FCC 2d 558, recon. denied, 61 FCC 2d 257 (1976).

29. Applying these principles here, we find, first, the record shows that Weis, rather than Turro, maintained control and ultimate responsibility with regard to WJUX's finances. Specifically Weis met with Fishman to discuss a sale of the construction permit, negotiated the purchase price for the permit, and was obligated to pay the balance due on the sale. Although Turro installed and tested Jukebox Radio equipment and provided general assistance to Monticello during the construction process, Weis directed the station's construction and alone paid the station's construction costs. Weis also personally guaranteed the station's lease agreements with MBC and made the lease payments for its site and main studio, and wrote the checks that paid WJUX's

operating expenses as well as its legal bills. He also hired the station's staff and paid their salaries. WJUX's staff referred all financial matters to Weis, and Turro had no check-writing authority on any Monticello account. In brokerage situations, "we require that licensees must maintain their own bank accounts, pay the salaries of their own employees, and remain responsible for their own obligations to programmers, utility companies, and other operational matters." WGPR, Inc., 10 FCC Rcd at 8145. Monticello met this requirement.<sup>5</sup>

30. Nevertheless the exceptors argue that Weis's financial control was undermined, first, by Turro's inducements to Monticello to enter into the Network Affiliation Agreement, including his \$40,000 payment and his personal guarantee of payments from Jukebox Radio during the duration of the Agreement up to \$400,000, and, second, by his provision of all of the station's income. We disagree with these contentions. The record shows that, albeit Turro was instrumental in introducing Weis to the idea, Weis decided to purchase the permit from Fishman and agreed to the arrangement proposed by Turro because he believed it was a good business opportunity. I.D., ¶ 20. Moreover it was at Weis's behest that the financial inducements to enter the Agreement were agreed to by Turro. It was Weis's testimony that he wanted the guarantee because of the possibility that Turro could go out of business and that he would not have built the station and entered into the Agreement without the initial \$40,000 payment. Tr. 1381-83, 1392, 1409-10. And Turro testified that Weis did not have to repay the \$40,000. Tr. 1831-32. Weis developed the specific amounts for the payment and the guarantee, which figures Turro accepted, and the inducements inured to Monticello's benefit; they did not evidence Turro's control over WJUX but rather served to increase Turro's financial obligations to Weis. Thus, although Weis may have used the \$40,000 to fund his down payment for the station, these facts do not establish that Turro was in financial control of WJUX.

31. Weis also determined the amount of the monthly payments from Jukebox Radio to Monticello under the Network Affiliation Agreement based on his business plan to cover capital costs and operating expenses and produce an acceptable profit, and at one point Weis demanded an increase in the payments to cover additional capital expenditures. I.D., ¶¶ 26-28. Weis's calculus was not unusual. By definition:

A [time brokerage] agreement is a contractual arrangement whereby the licensee makes its airtime available to the time broker in exchange for an amount calculated to incorporate the station's fixed and operating costs plus a built-in profit. So long as the time brokerage agreement governing the arrangement is one which retains the ultimate decision-making authority in the licensee, the receipt of [monthly payments] does not amount to the licensee's abdication of its control over finances.

WGPR, Inc., 10 FCC Rcd at 8145. Moreover, counter to Universal's assertion that Turro assumed all the risk, if Jukebox Radio missed any monthly payments to Monticello, the latter was still

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<sup>5</sup> Turro paid WJUX's telephone bills for a period of time, but the evidence indicates that Weis corrected this situation when he discovered it, and thus this episode is not indicative of a transfer of control to Turro. See ¶ 50, infra; I.D., ¶ 114.

obligated to pay the station's lease costs and other expenses. I.D., ¶ 47. And, finally, contrary to the exceptors' claims, Turro's provision of all of WJUX's income via monthly payments was not uncharacteristic of other time brokerage understandings approved by the Commission. See Choctaw Broadcasting Corp., 12 FCC Rcd 8534, 8541 (1997), citing WGPR, Inc., 10 FCC Rcd at 8145 (even where monthly time brokerage payments "constitute the sole source of funding of . . . broadcast operations for the term of the brokering arrangement," their receipt did not amount to abdication of control over finances); accord, Roy R. Russo, Esq., 5 FCC Rcd 7586, 7587 (MMB 1990).<sup>6</sup>

32. With respect to control over station programming, the exceptors argue that, under the Network Affiliation Agreement, WJUX was totally dependent on Turro to provide virtually all its programming, and Turro and Weis did not amend the Agreement to give Monticello the right to preempt Jukebox Radio programming until after the FCC began to focus on the parties' relationship. We disagree that these or any other factors in the record demonstrate that Monticello did not exercise ultimate control over WJUX's programming.

33. To begin with, although Weis contracted with Turro for Jukebox Radio to provide full-time programming to WJUX pursuant to the Network Affiliation Agreement, at the time Weis acquired the construction permit and entered into the Agreement, he believed that the Jukebox Radio music format would appeal to a large number of listeners in Sullivan County. Moreover, when the station went on the air, Weis directed his staff to carry public affairs programs and PSAs aimed at Monticello and Sullivan County.

34. Specifically Weis consulted with Blabey and arranged for public affairs programs produced by Blabey and aired on WVOS to be rebroadcast on WJUX on different days and at different times so that they were heard by a different audience. The Bureau questions this arrangement and points to the relatively small number of programs WJUX directed toward Sullivan

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<sup>6</sup> The Bureau asserts that there is "[n]othing in the record" which indicates that Turro's monthly payments were comparable to those made by other purchasers of brokered time, as required by the Bureau's 1991 ruling. But the Bureau carried the initial burden of going forward with the introduction of evidence on the transfer of control issue pertaining to Turro as well as the burdens of proceeding and proof on the transfer of control issue pertaining to Monticello. Salem Broadcasting, Inc., 6 FCC Rcd 4172 (MMB 1991), cited by Universal, is inapposite. There, unlike the facts present here, the licensee lacked control because, inter alia, the licensee was indebted to the time broker and the station's only revenue was \$20 per month it received from the broker, the licensee leased station equipment from the broker, the broker negotiated a tower lease, and the broker used its own transmitter rather than the station's. Contrary to Universal's additional claim, the indemnification provision of the Agreement was not an abdication of financial control by Monticello. Although this provision purports to indemnify Monticello against "all . . . forfeitures . . . imposed by the FCC," Weis and Turro both explained at the hearing that this clause only covered fines for something Jukebox Radio did and was limited to its provision of programming. It did not extend, for example, to a main studio rule violation by Monticello or operation of its transmitter beyond the authorized power. I.D., ¶ 30.

County as opposed to Bergen County, but does not show why the programs in question or the manner of their broadcast in fact were not responsive to the needs of the Monticello area and thus did not serve the public interest.<sup>7</sup> These programs included “Open Mike” – a forum for community leaders to be questioned by listeners – and “People Who Make a Difference” – which highlighted significant accomplishments of area residents and was produced locally in WJUX’s main studio. Contrary to the exceptors’ assertion that the ALJ focused excessively on events occurring after the Commission began to scrutinize the parties, the latter program aired prior to the FCC inspection and the issuance of letters of inquiry to Turro and Weis. Turro had no involvement in the production of either program. He stated that when Weis and Blabey decided to broadcast public affairs programming, he carried that programming on Jukebox Radio.<sup>8</sup>

35. Similarly, pursuant to Weis’s wish to broadcast public service announcements of interest to the community, Montana gathered material for PSAs and arranged for their broadcast over WJUX. Jukebox Radio almost always accepted her suggestions. If Turro had declined to carry this programming, Monticello could have deleted Jukebox Radio programming and substituted its own public affairs programs and PSAs. Weis also demonstrated his control over station programming at one point by announcing that WJUX would no longer carry political advertisements. I.D., ¶ 63. Weis later rescinded his decision, and WJUX thereafter preempted Jukebox Radio programming to broadcast local political commercials. In like manner, Blabey also placed emergency announcements of local importance on WJUX, such as when weather conditions forced road closings

36. The Amendment to the Agreement, which was intended to clarify Monticello’s responsibilities in accordance with its obligations to the Commission, is consistent with the evidence of the parties’ actual conduct. The Amendment provided that Monticello was responsible for ascertaining community needs and could delete, preempt, or substitute for Jukebox Radio programming in order to provide its own programming responsive to those needs. It also stated that Monticello was responsible for compliance with the Commission’s rules including, inter alia, those governing political programming, sponsorship identification, and maintenance of a public file. In these respects, the provisions of the amended Agreement closely approximated the terms of other brokerage agreements we have approved that did not transfer ultimate control over programming. See Choctaw Broadcasting Corp., 12 FCC Rcd at 8539; WGPR, Inc., 10 FCC Rcd at 8142-43; Roy R. Russo, 5 FCC Rcd at 7587.

37. With regard to the timing of the Amendment, although the Amendment was not signed until July 1995, it was retroactive to the beginning of the Agreement, which was entered into on October 17, 1994. Turro and Weis both testified that they agreed to the Amendment in November 1994, shortly following the Agreement, and five months prior to the Commission’s inspection of

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<sup>7</sup> WJUX received only two listener complaints, and neither related to the nature or adequacy of the station’s programming service to Monticello. See ¶ 47, infra.

<sup>8</sup> The Bureau points out that the WJUX call sign was previously associated with a noncommercial FM station held by Turro in Franklin Lakes, New Jersey, but we do not see how this fact establishes that Turro exercised control over WJUX’s operation.

the station in April 1995. They did so on the advice of counsel, who drafted the Amendment. In these circumstances, and in view of the fact that WJUX did broadcast public affairs and other programming not obtained from Jukebox Radio that was responsive to the needs of the community of Monticello, as early as February 2, 1995, we cannot agree with the exceptors that the Amendment was merely a reaction to FCC scrutiny.<sup>9</sup> Finally, with respect to the exceptors' claims regarding Turro's intentions to provide 100% of WJUX's programming, although Turro planned to purchase all of WJUX's airtime, as the Bureau recognizes, this too is consonant with Commission rulings setting no limits on the amount of time a station could sell. See Gisela Huberman, Esq., 6 FCC Rcd 5397 (MMB 1991); Brian M. Madden, Esq., 6 FCC Rcd 1871 (MMB 1991); Peter D. O'Connell, Esq., 6 FCC Rcd 1869 (MMB 1991). By the same token, Turro's sale of WJUX's commercial time is also consistent with the standard role of a time broker in these arrangements. See WGPR, Inc., 10 FCC Rcd at 8140; Roy R. Russo, 5 FCC Rcd at 7587.

38. We also agree with the ALJ that Weis, on behalf of Monticello, and not Turro, exercised control over WJUX's station personnel. Weis hired Blabey, as general manager, Montana, as public affairs director, Spicka, to do engineering work, and Kirschner, as chief operator. Turro was not involved in these hiring decisions. Blabey and Montana had written agreements with Weis regarding their employment and pay. Montana was supervised by Blabey and ultimately answered to Weis. She also understood that Weis supervised Blabey. Moreover, despite exceptors' contentions, there is no evidence that Turro exercised ultimate control over WJUX simply by virtue of his position as chief operator from October 1994 to August 1995. Turro was chief operator at the time of the FCC inspection in April 1995, so it was not inappropriate for Blabey to put him in contact with Serge Loginow, the FCC engineer conducting the inspection, to answer questions about station operations.<sup>10</sup> In sum, we conclude that neither Turro nor Monticello engaged in an unauthorized transfer of control of WJUX. Even if an unauthorized transfer of control had occurred, we have held that revocation or nonrenewal of a station authorization would not be appropriate in the absence of concealment and misrepresentation, which we do not find present here. See ¶ 74, *infra*; Bennett Gilbert Gaines, 8 FCC Rcd at 1408., and cases cited therein.

39. As a final matter, although the exceptors argue that the ALJ unduly emphasized the individual aspects of the traditional test for determining control, as opposed to the parties' history

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<sup>9</sup> Universal also claims that New York's statute of frauds would have precluded Weis from enforcing the unsigned Amendment, but there is no evidence that Turro was not in compliance with the Amendment prior to its formal signing. Moreover, as explained in the text, we have evaluated the parties' relationship in accordance with our own standards governing transfer of control of broadcast licenses. Although Universal also attributes significance to the fact that the Agreement preceded Weis's purchase of the construction permit by one day, the record shows that these essentially contemporaneous actions were taken pursuant to the parties' connected plan for Weis to acquire the station and Turro to supply programming to it pursuant to the Network Affiliation Agreement.

<sup>10</sup> We address the exceptors' claims regarding remote control of WJUX's transmitter and the main studio telephone at ¶¶ 58-59, *infra*, under the main studio issue.

prior to construction, we find that the ALJ's analysis was consistent with Commission precedent and that, in any case, the overall circumstances do not warrant a contrary result. The facts that Turro and Weis had known each other a long time, that Turro informed Weis of the permit's availability, and that Turro had previously sought Commission authority to originate programming do not establish that Turro assumed unauthorized control of the station. Trinity Broadcasting of Florida, Inc., 14 FCC Rcd 13570 (1999), vacated in part, No. 99-1183 (D.C. Cir. May 5, 2000), cited by the exceptors, does not support a departure from the policies we typically consider most indicative of control. See 14 FCC Rcd at 13596 ¶ 72 (examining station finances, personnel matters, and programming in order to determine whether "parent" entity had power to dominate management of corporate affairs).

### III. MAIN STUDIO ISSUE

#### A. Findings

40. WJUX's community of license, Monticello, with a population of 7,000, and WVO's community of license, Liberty, with a population of 5,000, are located about ten miles apart in Sullivan County, New York. The main studios of both stations are located in separate quarters in the same building in Ferndale, New York, which is adjacent to Liberty. WJUX is a tenant of MBC, the licensee of WVO. I.D., ¶¶ 67-68. The HDO raised questions as to whether the WJUX main studio had program production and transmission capability, remote control equipment to control the transmitter, a toll-free telephone number for the residents of Monticello, and a meaningful staff presence. 12 FCC Rcd at 6270-71.

41. Weis testified that, at the time of the FCC inspection on April 13, 1995 and thereafter, the WJUX studio was equipped to originate programming and deliver it to the transmitter site for broadcast. Herman Hurst, an experienced engineer who did consulting work for Turro and Monticello, also testified that the WJUX main studio had programming capability. Turro stated that the main studio equipment was working at the time WJUX was constructed in October 1994. Serge Loginow, Jr., the FCC field engineer who conducted the inspection in April 1995, was shown WJUX's main studio equipment, including a control board typically found in a studio from which programming could be originated, as well as a microphone and tape machines. Blabey stated that he informed Loginow that programming could be originated from the WJUX studio by throwing a switch located down the hall in the WVO transmitter room, without having to visit the WJUX transmitter site. Montana also testified that programming could be originated from the WJUX main studio without leaving the studio building. I.D., ¶¶ 69-70, 72, 76-77, 79.

42. Weis further testified that the WJUX transmitter could be remotely controlled from WJUX's main studio by telephone dial-up. At the time of the FCC inspection, Turro informed Loginow that, although there was "no remote control equipment" at the WJUX studio, there was a dial-up remote control system available at the main studio. Blabey testified that at the time of the inspection there was a telephone at the main studio that could be used, after dialing a number and entering a code, to control the transmitter. Montana also testified that there was dial-up remote control capability for the transmitter from the main studio and that she knew how to use it. And

Hurst testified that WJUX had remote control capability to its transmitter from its main studio at the time of the FCC inspection. Id. at ¶¶ 69, 102, 104-05.

43. With regard to its staffing, Weis testified that WJUX was adequately staffed by Blabey, its general manager, and Montana, its public affairs director. Although Blabey and Montana were also employed by WVOX, Weis stated that they had more than adequate time to perform their duties for WJUX. Because the WJUX and WVOX main studios were located in the same building, Blabey and Montana were based full time in the Ferndale building. Id. at ¶ 82.

44. Blabey acted as WJUX's general manager from the time the station began broadcasting. Blabey's employment agreement with Monticello described him as an "independent consultant on radio station management matters," and Blabey stated the agreement was structured this way for tax reasons. The agreement provided that Blabey would be available to the station during normal business hours, and Blabey stated that he was already present during those hours in connection with WVOX. Blabey stated that he represented the community to Weis because Weis was not a Sullivan County resident. Blabey explained that he was involved in the community and participated in civic organizations on behalf of both WJUX and WVOX, and people in the community associated him with both stations. Id. at ¶¶ 84-85.

45. Blabey recruited and suggested employees for Weis to hire. All of WJUX's employees, with the exception of Kirschner, who replaced Turro as chief operator, were hired at Blabey's recommendation. Blabey also supervised Montana's work. Typically Blabey's duties at WJUX included answering the telephone, going through the mail, handling inquiries, informing Weis of financial or other matters that required his attention, arranging for programming, and making decisions. Blabey was familiar with the station's issues/programs lists, which were prepared by the Jukebox Radio staff. He also prepared Arbitron information requests for the station. Id. at ¶¶ 86-87.

46. Blabey stated that he and others in the building could tell if service on WJUX was interrupted because they monitored the station periodically on the radio and listeners called in. When he learned that the station was off the air, he took steps to put it back on. Blabey had an arrangement whereby Weis paid him commissions for sales made locally for commercials on WJUX. In February 1995 Blabey sought to engage another salesperson to sell time locally on the station. Weis approved the hiring of Stan Silverstein for this purpose. Id. at ¶¶ 88-90.

47. Montana stated that she worked full time as WVOX's business manager and part time as WJUX's public affairs director. Blabey described Montana as a very competent person who held the WVOX operation together. She began working for WJUX in October 1994. Originally she was engaged as an independent consultant but later became an employee. When she was first engaged, Blabey told her she would work the same hours for WJUX as she did for WVOX. Montana's duties included picking up the mail at the post office, distributing the mail at the studio building, bringing to Weis or Blabey's attention mail they needed to see, bringing bills to Blabey and Weis for payment, handling petty cash, dealing with walk-ins, and taking care of callers' requests. She remembered receiving only two listener complaints about WJUX, one involving a listener's



inability to receive the station's signal on his cable system, and the other involving a complaint about the station's music content. With respect to the latter, she informed Jukebox Radio, which then made an appropriate adjustment to its schedule. Montana monitored the station's broadcasts on her way to and from work. When there was a program interruption, she informed WJUX's engineer. Id. at ¶¶ 91-95.

48. Montana represented WJUX in the community and made sure that PSAs of interest to the community were broadcast on the station. She stated that she had lived in Sullivan County for approximately twenty years, that people knew she worked for WJUX, and that they told her of relevant events for broadcast on both WJUX and WVOX. Montana prepared PSA bulletin boards for WJUX and WVOX. She prepared the WVOX bulletin board first and then used it for WJUX. The bulletin boards were generally the same for both stations, although on one or two occasions she edited something out of the WVOX bulletin board before using it for WJUX. She decided, without consulting Blabey or Weis, what would be included on the bulletin board. Montana received, but did not prepare, the programs/issues lists for WJUX and put them in the station's public file. The public file was maintained at the Monticello public library, and a copy was kept at WJUX's main studio. Id. at ¶¶ 96-97.

49. Turro served as WJUX's chief operator from the time the station went on the air until mid-1995. He was then replaced by Kirschner, who was hired by Weis. Monticello hired Spicka in August 1995 as an engineer, and he conducted weekly Emergency Action Notification System tests and meter readings. Spicka was an employee, not a consultant, and did not work for WVOX. He assisted at the time of the FCC inspection, and when a fiber optic cable was cut and the Jukebox Radio feed interrupted in the summer of 1995, Spicka originated music from the WJUX main studio. WJUX also employed Charles Martin to fill in when Blabey, Montana, and Spicka were away. Id. at ¶¶ 98-100.

50. On November 2, 1994, WJUX established a local telephone number for its main studio. The number was publicly listed and was toll-free for Monticello residents. Calls to the local number were not answered at the main studio but were forwarded to the Dumont studio and answered there. In July 1995, subsequent to the FCC inspection, the call-forwarding arrangement was terminated and all calls to the WJUX telephone number were answered at the WJUX main studio. Montana testified that even before a telephone for WJUX was installed in her office in July 1995, people in the community knew that the WJUX and WVOX studios were located in the same building, and people wanting to call WJUX would call on the WVOX line. NYNEX sent the bills for telephone service from November 1994 to mid-1995 to Jukebox Radio, which paid them. When Weis discovered that this was the case, the billing was changed and Monticello paid all subsequent bills for WJUX telephone service. Id. at ¶¶ 107-08, 113-14.

## **B. ALJ Conclusions**

51. With one minor exception, the ALJ found that Monticello was in full compliance with the Commission's main studio rules. First, with respect to 47 C.F.R. § 73.1120, which provides that every broadcast station "will be licensed to the principal community . . . which it primarily

serves," the ALJ rejected the contention that WJUX primarily served Bergen County, New Jersey, rather than Monticello, New York. Second, the ALJ found that Monticello complied with 47 C.F.R. § 73.1125(a), which required it to maintain a main studio within the principal community contour of the station, because its main studio in Ferndale, New York was located within that contour.<sup>11</sup> Third, with regard to 47 C.F.R. § 73.1125(c) (currently 73.1125(d)), which requires a broadcast station to "maintain a local telephone number in its community of license or a toll-free number," the ALJ determined that the station violated this provision for a brief time because it did not maintain a local telephone number until November 2, 1994, which was twelve days after it began broadcasting on October 21, 1994. The ALJ concluded that this rule violation was de minimis. As for the period from November 2, 1994 to July 1995, when calls were forwarded to Dumont, New Jersey, the ALJ held that there was no rule violation because calls to the WJUX number during this period were toll-free for residents of Monticello.

52. With regard to program origination capability, the ALJ concluded that the testimony of numerous witnesses established that the WJUX main studio contained all the equipment necessary for program production and that the equipment was capable of being used for that purpose. Similarly, with regard to remote control capability, the ALJ found that the WJUX transmitter was capable of being controlled by remote control from either the WJUX main studio or the Dumont studio, that WJUX's employees at the main studio knew how to use the dial-up remote control system, and that such operation was fully consistent with Commission requirements. Finally, as to the staffing at WJUX's main studio, the ALJ found that the presence of Blabey and Montana at the Ferndale main studio building constituted a meaningful management and staff presence that was fully consistent with Commission precedent. In the ALJ's view, the record clearly reflected that the WJUX main studio was attended on a full-time basis during normal business hours by Blabey and Montana.

### **C. Exceptions**

53. The Bureau argues that the I.D. erroneously concluded that Blabey and Montana constituted a meaningful management presence at WJUX. With respect to Blabey, the Bureau states that WJUX's issues/programs lists were not prepared by him, but by Turro's Jukebox Radio staff, that Blabey was engaged only as an independent consultant and paid a weekly consulting fee, that he continued to work as WVOS's general manager, and that his overriding concern was the operation of WVOS, not WJUX. With respect to Montana, the Bureau points out that, notwithstanding her role in preparing PSA bulletin boards, the decision as to what PSAs were actually produced and broadcast was made at the Dumont studio, that she also was engaged initially by WJUX as an independent consultant, and that she functioned full-time as WVOS's business manager. Finally, because it believes the evidence shows that Turro, rather than Monticello's staff, controlled the operation of WJUX, the Bureau asserts it was error for the ALJ to find that Monticello complied with the managerial presence requirement of the main studio rule.

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<sup>11</sup> The current version of 47 C.F.R. § 73.1125(a) permits location of the main studio within the principal community contour of any station licensed to that community.

54. Universal argues first that the Monticello main studio did not have a WJUX sign and thus could not be considered readily accessible to the community of license. Second, Universal maintains that WJUX did not have a meaningful managerial and staff presence at its facility because it only had a part-time skeletal staff of two consultants whose primary responsibilities ran to WVOS. Third, Universal asserts that WJUX did not maintain a local toll-free telephone number and that its call-forwarding arrangement was insufficient. And, finally, Universal contends that WJUX did not have satisfactory transmitter remote control capability at its main studio.

55. In reply, Monticello asserts that its main studio in Ferndale, New York is readily accessible to the public because it is within the station's principal community contour. It further argues that its lack of a local telephone number for a twelve day period does not warrant an adverse determination against it under the rule or imposition of a sanction. Next it contends that the I.D. correctly found that WJUX had remote control capability. Finally, Monticello maintains that its employment of Blabey and Montana meets the Commission's requirement of having a meaningful managerial and staff presence at the main studio.

#### **D. Discussion**

56. This issue pertains to whether Monticello complied with the provisions of the Commission's main studio rules with regard to WJUX. "A station must maintain a main studio which has the capability adequately to meet its function . . . of serving the needs and interests of the residents of the station's community of license." See Main Studio and Program Origination Rules, 3 FCC Rcd 5024, 5026 (1988). We conclude that, except for the one infraction found by the ALJ, Monticello met our requirements, and that its one violation was too minor to warrant revocation of Monticello's authorization or imposition of a forfeiture.

57. First, the WJUX main studio in Ferndale, New York was located within the station's principal community contour, in accordance with 47 C.F.R. § 73.1125(a). The fact that for a time there was no sign identifying the WJUX main studio does not mean the studio was not readily accessible to the public, as Universal alleges. The record shows, through Montana's testimony, that people in the local community knew she worked for WJUX and would bring to her attention relevant events for broadcast over the station, and, even before a telephone was installed in her office and a sign placed out front, people in the community knew that the WJUX studio was located in the same building as the WVOS studio.

58. Second, there is no question that, during the first twelve days WJUX was on the air – October 21 to November 2, 1994 -- Monticello did not comply with the requirement of 47 C.F.R. § 73.1125(c) that it "maintain a local telephone number in its community of license or a toll-free number." But this was not by itself a matter warranting a sanction, particularly since it was corrected after a relatively short time, and Monticello was truthful in reporting the violation in response to the Bureau's letter of inquiry and during pre-hearing discovery. We disagree with Universal that Monticello also violated this rule for a longer period between November 1994 and July 1995. Before all calls to WJUX were answered at the WJUX main studio beginning in July 1995, calls to the WJUX number that were forwarded to the Dumont studio and answered there still

were toll-free for Monticello residents, as the rule requires. Moreover Montana explained that, prior to July 1995, because local residents knew that the WJUX and WVOS studios were in the same building, people wanting to call WJUX would do so on the WVOS line. In these circumstances, we conclude that Monticello was in compliance during this period.

59. There is no support for Universal's additional claim that WJUX did not have transmitter remote control capability at its main studio. Weis, Blabey, Montana, and Hurst all testified to the existence of a telephone dial-up remote control system at the main studio. Blabey and Montana were familiar with how to use the system, and there was a telephone at the main studio that could be used for this purpose.

60. The exceptors also argue that Monticello did not maintain a meaningful management and staff presence at WJUX. We disagree. The Commission requires a station to have a meaningful management and staff presence at its main studio in order to "help expose stations to community activities, help them identify community needs and interests and thereby meet their community service requirements." See Main Studio and Program Origination Rules, 3 FCC Rcd at 5026. In this regard, we have stated that a main studio must be staffed by management and staff personnel at all times during normal business hours. This standard requires management and staff presence on a full-time basis, which may be satisfied by more than two people working on part-time bases. See Jones Eastern of the Outer Banks, Inc., 6 FCC Rcd 3615 (1991), clarified, 7 FCC Rcd 6800 (1992). Specifically:

We require that management personnel report to work at the main studio on a daily basis, spend a substantial amount of time there and . . . use the studio as a 'home base.' Ultimately, that management presence must remain responsible for whatever station operations occur from that studio. To the extent that the staff person may fully perform . . . station functions with time to spare, and coverage of the main studio permits, that person may also take on responsibilities for another business, as long as the main studio remains attended during normal business hours.

7 FCC Rcd at 6802. Monticello satisfied these requirements.

61. Monticello maintained a meaningful management and staff presence at WJUX through its employment of Blabey and Montana. Because of their other employment with WVOS, whose studio was in the same building as WJUX's, they were in the main studio building on a full-time basis during regular business hours. Blabey's employment agreement with WJUX specified that he would be available during normal business hours, and he stated that he already was present during those hours in connection with WVOS. Similarly, Montana was told by Blabey that she would work the same hours for WJUX as she did for WVOS. It is clear from the record that both had significant work duties at WJUX and put in substantial time on a daily basis at the station's main studio. Blabey performed managerial duties, including recruiting employees who were subsequently hired by Weis, supervising Montana, arranging for public affairs programming and emergency announcements to be broadcast over WJUX, putting the station back on when it went off the air, and representing WJUX in the community through his membership in civic

organizations. Montana had numerous staff duties, which included dealing with listeners requests and complaints, distributing the mail and bringing important items to the attention of Weis or Blabey, and seeing to it that PSAs of local interest were broadcast in connection with her preparation of a PSA bulletin board.

62. We also disagree with the exceptors' specific objections to the status of these two employees. First, although Blabey was designated a consultant, this was done for tax reasons and did not affect his management duties or responsibilities at WJUX. Second, Weis testified that both Blabey and Montana had more than sufficient time to perform their jobs for WJUX notwithstanding their other employment at WVOS. Although the Bureau expresses concern over the WJUX staff's employment by a "potential competitor," it does not show how the relationships in question had any impact on the job performance of Blabey or Montana. Additionally their part-time status at WJUX was not in itself significant because we only require a full-time presence at the main studio, not that each person be employed on a full-time basis. The WJUX main studio remained attended by Blabey and Montana during regular business hours. See Jones Eastern of the Outer Banks, Inc., 7 FCC Rcd at 6802 (management personnel not required to be "chained to their desks" during normal business hours and staff personnel may hold other jobs). It is also clear from the record that the roles of these employees, including the time required for them to perform their duties at WJUX and their pay, were reflective of the existence of the time brokerage arrangement between the parties under the Network Affiliation Agreement, and the fact that substantially all of the programming and advertising for WJUX was provided by Jukebox Radio. Finally, because we have already concluded that Turro did not exercise unauthorized control over WJUX, we disagree with the Bureau that his operational activities undermined Monticello's compliance with the managerial presence requirement of the main studio rules.<sup>12</sup>

#### IV. MISREPRESENTATION/LACK OF CANDOR ISSUES

63. These issues relate largely to matters already discussed in this opinion, but involve specifically the question of whether Turro or Weis made statements with respect to these matters that were not true.

##### A. Findings

64. On June 21, 1995, the Bureau's Complaints and Investigations Branch sent a letter of inquiry to Turro regarding the details of his translator station operations and his relationship with WJUX. Turro filed a response to the Bureau letter on July 30, 1995. With respect to his translators, Turro stated that Jukebox Radio programming he produced at the Dumont studio was delivered by telephone line to WJUX, that it was broadcast by WJUX pursuant to the terms of the

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<sup>12</sup> KQQK, Inc., 10 FCC Rcd 132 (MMB 1994), cited by the Bureau, is inapposite. There, unlike the facts in this case, there was no time brokerage arrangement, and the licensee did not establish a managerial presence at the main studio because it was unable to describe its official's management duties or demonstrate that he was authorized to make typical management decisions.

Network Affiliation Agreement, that the WJUX broadcasts were received off the air at the Pomona translator and rebroadcast, and that the Pomona translator rebroadcasts, in turn, were received off the air at the Fort Lee translator and rebroadcast. Turro also stated that, prior to January 10, 1995, the date Weis transferred his interest in the Pomona translator to him, the WJUX signal was received directly off the air at the Fort Lee translator rather than through the Pomona translator. Supported by an engineering statement from Hurst, Turro stated that although an acceptable signal can be received off the air at the Fort Lee translator site, a better signal can be received at the Pomona translator, and thus that is where the WJUX signal is received for rebroadcast. Turro also stated that none of the programming created at the Dumont studio was delivered by telephone line to either the Fort Lee or Pomona translator. Id., ¶¶ 198-200.

65. With respect to his relationship to WJUX, Turro stated that he had no ownership interest in Monticello, that he did not pay to construct the station's facilities or guarantee the repayment of funds borrowed for construction, that he did not pay WJUX's operating expenses except for its telephone bills, and did not control its programming. Turro stated that he did assist Weis in installing equipment at WJUX, that he provided Weis with \$40,000 as an inducement to enter into the Network Affiliation Agreement, and that he served as chief operator of WJUX until May 1, 1995. As to WJUX's programming, Turro stated that Monticello had complete discretion to delete or preempt Jukebox Radio programming and broadcast other programming. Id. at ¶ 203.

66. On June 21, 1995, the Bureau's Complaints and Investigations Branch sent a letter of inquiry to Monticello regarding the details of WJUX's ownership, operation, and control. Monticello filed a response with the Bureau on July 28, 1995. In the response Weis stated that he was the sole owner of Monticello and that Turro had never held an ownership interest in WJUX. Weis asserted that he provided all of the funds used to construct the station, that he had on hand much of the needed equipment, and that the only money he borrowed in this connection was \$15,000 from his mother. He further stated that Turro paid him \$40,000 as an inducement to enter into the Network Affiliation Agreement and that Weis applied these funds to meet his obligations to Fishman. Id. at ¶¶ 204-05.

67. Weis stated that he controlled WJUX's financial records, paid WJUX's operating expenses except for the telephone bills that Turro had paid, and hired station personnel. The telephone bills were sent to and paid by Turro as the result of an oversight, Weis stated, which was being corrected. Weis also stated that WJUX's main studio was located within the station's principal community contour, that it was open to the public, that the station's public inspection file was maintained at the main studio, and that the program "Sullivan County People Who Make a Difference" was recorded there. Weis asserted that Blabey and Montana had their offices at the main studio and were present there during normal business hours, that the main studio had program origination capability, and that a remote control point for the WJUX transmitter was located there. He affirmed that he was solely responsible for WJUX's programming policies and for Monticello's decision to enter into the Network Affiliation Agreement. Id. at ¶¶ 206-08.

## **B. ALJ Conclusions**

68. The ALJ concluded that at all times Turro dealt with the Commission in a truthful, candid, and forthright manner. Specifically the ALJ found that Turro did not lack candor in his request for a declaratory ruling, and that even if Turro had disclosed more details in his request, including his intention to program WJUX fulltime, the Bureau's ruling, based on its contemporaneous precedent, would not have been substantially different. The ALJ also found that Turro's statement in response to the Bureau's letter of inquiry that he had no present or future ownership interest in Monticello was accurate, and that Turro also disclosed in his response that he was providing all of the programming for WJUX and was personally guaranteeing Jukebox Radio payments to Monticello. Additionally the ALJ found the fact that Turro entered into a network affiliation agreement instead of a time brokerage arrangement was not deceptive or decisionally significant. Finally the ALJ concluded that Turro lived up to the representations made in his request for a declaratory ruling.

69. The ALJ also concluded that both Monticello and Weis dealt with the Commission in a truthful, candid, and forthright manner. Specifically the ALJ found that Weis's statements in response to the Bureau's letter of inquiry were truthful because Weis, rather than Turro, was in sole control of WJUX's finances. Moreover, the ALJ held, the financial arrangements between Turro and Monticello were fully disclosed. In addition, the ALJ found that Weis truthfully represented that he, and not Turro, had ultimate supervisory control of WJUX's programming. Weis's statements concerning Blabey and Montana and the capabilities of the WJUX main studio were also accurate, the ALJ concluded.

### **C. Exceptions**

70. The Bureau argues that, contrary to claims made by Turro and Monticello in their responses to the Bureau's letters of inquiry and in Weis's testimony, Turro controlled WJUX's programming. In the Bureau's view, Turro did not simply provide a network feed to WJUX, which Monticello was free to accept or reject, but, rather, all of WJUX's programming was transmitted from Turro's Dumont studio. Jukebox Radio had complete discretion to reject programming received from Blabey and Montana, the Bureau asserts, and Weis and his staff did not know if Jukebox Radio broadcast the PSAs Montana sent via the WJUX bulletin board. Moreover, the Bureau avers, Jukebox Radio or Turro prepared the station's issues/programs lists, even though the amended network affiliation agreement provided that Monticello was responsible for doing so. The Bureau contends that Turro and Monticello lacked candor in failing to reveal the totality of their programming arrangement and in seeking to conceal the true nature of Turro's control. The parties were motivated to deceive, the Bureau concludes, because their arrangement was not consistent with the Bureau's November 1991 ruling or the Commission's translator rules.

71. Universal contends that Turro misrepresented by fraudulently inducing the Bureau to issue its 1991 ruling. Having been rebuffed in his previous attempts to obtain authority to initiate programming on his Fort Lee translator, Universal argues, Turro was motivated to conceal from the Bureau important information including his intention to provide all of WJUX's programming.<sup>13</sup>

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<sup>13</sup> Universal also argues that Turro knew the proposed business relationship with Weis was

Universal maintains that Turro and Weis also did not disclose to the Bureau that Turro would fund the costs of construction and operation of WJUX and assume all the risk of operating the station. Furthermore, in Universal's view, Turro departed from the letter of the Bureau's ruling because Turro's relationship with Weis was not a bona fide, arm's length arrangement. Universal also argues that Turro and Weis sought to vest control of WJUX in Turro and to conceal that control from the Commission. Finally Universal maintains that Turro and Weis deceived the Commission because WJUX was not intended to serve its community of license, but was created in order to air programming over the Fort Lee translator for the benefit of Bergen County.<sup>14</sup>

72. Turro replies to Universal that the Commission did not designate candor issues based on Turro's actions in obtaining and acting upon the 1991 Bureau ruling. Nevertheless Turro argues that his request for a declaratory ruling provided all the material facts. Turro further argues that he reasonably relied on the Bureau's ruling and entered into an arrangement with WJUX in exact compliance with what he requested and the Bureau authorized. Moreover, Turro states, there is no evidence that the Bureau was deceived by his actions.

73. Monticello replies that although it has maintained an ongoing business relationship with Turro, Weis has controlled all aspects of WJUX's operation since he acquired the construction permit. Even if the Commission found otherwise, Monticello asserts, there is no evidence that Weis intended to deceive the Commission concerning his role with WJUX. Weis believed, Monticello states, that the Bureau's ruling authorized the arrangement between Jukebox Radio and Monticello and that WJUX was operated in accordance with what had been approved.

#### **D. Discussion**

74. These issues pertain to whether Turro misrepresented or lacked candor to the Commission regarding the operation of his translator stations, and whether Monticello misrepresented or lacked candor to the Commission regarding the operation of WJUX. We have already reviewed many of the underlying facts in the earlier sections of this opinion. We conclude, with regard to those matters as well as the additional findings herein, that neither party was untruthful in its statements or intended to deceive the Commission. See Fox River Broadcasting, Inc., 93 FCC 2d 127, 129 (1983) (misrepresentation involves false statements of fact whereas lack of candor involves concealment or evasion; both must be coupled with intent to deceive).

75. Turning first to Turro, we are not persuaded by the evidence that Turro intended to deceive the Commission in obtaining the Bureau's 1991 letter, or that he thereafter dealt deceitfully with us. In his request for a declaratory ruling, Turro basically inquired whether a translator station

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contrary to 47 C.F.R. § 74.1232(d), which precludes any "connection" between a primary station and a translator whose coverage contour extends beyond the protected contour of the primary station. We consider Universal's arguments with respect to this rule provision at ¶¶ 83-90, infra.

<sup>14</sup> We consider Universal's additional argument that Turro used his intercity relay station WMG-499 as part of his scheme to improperly provide service through his Fort Lee translator at ¶¶ 80-82, infra.



could purchase air time on the station it rebroadcasts and sell advertising during that time. The Bureau understood that Turro was asking whether it was permissible under the rules governing the operation of translator stations for a translator licensee to enter a time brokerage arrangement with a primary station, provided that the primary station does not reimburse the translator for the purchased time or financially support its operation. Although Turro did not state that he planned to provide all of the primary station's programming or sell all its advertising, albeit his testimony indicated that he had in mind purchase of 100% of the station's time, there is no direct evidence that he intended to mislead the Bureau by deliberately concealing this information or that he had reason to do so. As the ALJ found, it was not uncommon at the time for the Bureau to approve time brokerage arrangements involving comparable if not identical programming and advertising terms and to point out specifically that the Commission sets no limits on the amount of time a brokered station may sell. See, e.g., Peter D. O'Connell, 6 FCC Rcd at 1869. Moreover, while even useless deceptions can be a basis for disqualification, see FCC v. WOKO, 329 U.S. 223 (1946), the record evidence does not support a finding that Turro intentionally withheld these facts in order to get Bureau approval. Though Turro's previous unsuccessful efforts to obtain Commission authority to originate programming on his Fort Lee translator arguably could have motivated him to conceal his true intentions in this regard, we do not believe the weight of the evidence supports this inference, particularly since the Commission's prior rulings were a matter of public record, and Turro openly sought Bureau guidance regarding the relationship between a translator station and a primary station.

76. The Bureau maintains that the parties concealed that their arrangement was not consistent with the Bureau's ruling, but both Turro and Weis expressly believed that the Bureau's ruling authorized their arrangement. We stated in the HDO that Turro's belief was not unreasonable, and we find nothing in the hearing record to change our view. See ¶ 85, infra. Moreover the parties adhered to the four specific conditions set forth in Turro's request for a declaratory ruling, namely, that the translator would operate outside the originating station's primary contour, that the primary station would not financially support the translator station, that the translator station would observe the Commission's rules governing the purchase of brokered airtime, and that advertising could be sold to support the programming. Universal claims that Turro also sought to deceive the Commission because he entered into a network affiliation agreement, rather than the time brokerage agreement authorized in the Bureau's 1991 letter, but the record shows that the agreement was fashioned on the advice of counsel and, in any event, the Bureau has treated these contractual arrangements identically in applying the Commission's policies regarding station control. See Joseph A. Belisle, Esq., 5 FCC Rcd 7585 (1990).

77. Turro's response to the Bureau's letter of inquiry was forthright and consistent with his actions. Thus, we disagree with the Bureau's principal contention that, contrary to his statements, Turro actually controlled WJUX's programming. Certainly most of the station's programming came from Jukebox Radio, in accordance with the Network Affiliation Agreement, but Monticello also provided its own public affairs programming, PSAs, and emergency announcements, as warranted. As we concluded earlier, Monticello, not Turro, retained ultimate control over WJUX's programming. Although Jukebox Radio had discretion to reject Monticello's programming, Monticello had final authority to delete Jukebox Radio programming and substitute its own

programming. The Bureau points out that Jukebox Radio prepared WJUX's quarterly issues/programs lists, but Blabey was familiar with these lists and Montana placed them in the station's public file at the local library and maintained a copy at the station's main studio. There is no evidence of deception in these facts. Although the Bureau also states that WJUX was not monitored to determine if Montana's PSAs were broadcast, the record shows that her PSAs almost always were carried. In the same vein, although Universal asserts that Turro did not disclose his funding and advertising plans for WJUX, we have already concluded that these arrangements were not unusual in a time brokerage setting or indicative of an unauthorized transfer of control of the station.

78. For similar reasons, we conclude that Monticello's response to the Bureau's letter of inquiry and Weis's testimony also were not false or evasive. Universal contends that WJUX was a "sham" station, which served Turro's interests in New Jersey, rather than the community of Monticello, and that Weis was untruthful in maintaining the contrary. And the Bureau argues that Monticello was untruthful in describing Turro's control of WJUX's programming. But the record simply does not support these contentions. As we have previously found under the transfer of control and main studio issues, Weis alone was responsible for WJUX's finances, ultimately controlled its programming, and was in charge of station personnel. WJUX also complied with the fundamental main studio requirements, including having program origination and remote control capability, and maintaining a meaningful managerial and staff presence. Thus ultimate decision-making authority was retained by Monticello, and WJUX served its community of license. At all times, Monticello and Weis accurately described these underlying facts to the Commission and truthfully represented the relationship between the parties under the Network Affiliation Agreement.

79. Finally, as noted, the ALJ ultimately found that at all times both Turro and Weis "dealt with the Commission in a truthful, candid, and forthright manner." *I.D.*, ¶¶ 294, 302. Although this conclusion was not based on explicit demeanor findings with regard to their hearing testimony, nevertheless, the ALJ actively questioned both witnesses at the hearing and carefully scrutinized their testimony. After having an opportunity to observe them, the ALJ accepted their statements. His determination that they were forthright "at all stages of this case," *id.*, lends support to our conclusion that neither engaged in misrepresentation or lacked candor with the Commission. *Cf. Rainbow Broadcasting Co.*, 13 FCC Rcd 21000, 21013 (1998), *aff'd by judgment sub nom. Press Communications LLC v. FCC*, No. 98-1366 (D.C. Cir. May 25, 1999).

## V. OTHER MATTERS

### A. Translator Rules Issue

80. This issue was specified to determine whether Turro violated Commission rules relating to the operation of FM translator stations. Pursuant to 47 C.F.R. § 74.1231(b), "[a]n FM translator may be used for the purpose of retransmitting the signals of a primary FM radio broadcast station or another translator station the signal of which is received directly through space, converted, and suitably amplified." The Commission has stated that the primary FM station signal being

rebroadcast "must be received directly over-the-air at the translator site." FM Translator Stations, 8 FCC Rcd at 5093. The ALJ concluded that Turro's operation of his Fort Lee and Pomona translators was in complete compliance with this rule. Specifically the ALJ found that the Fort Lee and Pomona translators received the off-air signal of WJUX "directly through space" and that, after the Pomona translator started to rebroadcast WJUX, the Fort Lee translator received the off-air signal of the Pomona translator "directly through space" and retransmitted the signal of the Pomona translator on a regular basis. See ¶ 64, supra.

81. Under 47 C.F.R. § 74.531(c), an intercity relay station may be used only "to transmit aural program material between noncommercial educational FM radio stations and their co-owned noncommercial educational FM translator stations . . . and between FM radio stations and FM translator stations operating within the coverage contour of their primary stations." The ALJ found that, from late October 1994, when the Fort Lee translator began rebroadcasting WJUX, until early July 1995, when WMG-499 was deactivated, Turro used his relay station to transmit aural program material and telemetry or data from his program production studio in Dumont to the Fort Lee translator, and that such use was unauthorized by the rule.<sup>15</sup> The ALJ concluded that a \$3,000 forfeiture would be the most appropriate sanction for Turro's violation of 47 C.F.R. § 74.531(c), but that assessment of a forfeiture was precluded by the one year statute of limitations contained in 47 U.S.C. § 503(b)(6) and 47 C.F.R. § 1.80(c)(1).

82. Based on the results of the field inspections and the other information before the Commission at the time, the HDO raised questions as to whether the Fort Lee translator was receiving the programming airing on WJUX directly from Jukebox Radio's Dumont studio and was not retransmitting WJUX's off-the-air signal, whether intercity relay station WMG-499 was being used to deliver programming from the Dumont studio directly to the Fort Lee translator, and whether both translators have also been programmed through telephone lines from the Dumont studio. The Bureau does not except to the ALJ's findings or conclusions under this issue, however, and thus no longer disputes any of these matters. In a footnote to its exceptions under the misrepresentation issues, Universal submits that Turro also violated Sections 74.531(c) and 74.1231(b). Universal argues, based on the testimony of two former Jukebox Radio employees, that the Fort Lee translator routinely rebroadcast programming received directly from WMG-499, rather than off the air from WJUX. We reject this contention as unsupported by the record. The ALJ found that the testimony of the witnesses in question, who were working for Universal at the time of their appearance, was not credible. Specifically he found their testimony was riddled throughout by "major contradictions, inconsistencies, inaccuracies, and misunderstandings." The

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<sup>15</sup> The ALJ also found that the audio programming received by the Fort Lee translator was not retransmitted unless there was an emergency. I.D., ¶ 273. In addition, the ALJ found that, prior to the time he began rebroadcasting commercial FM station WJUX, Turro was in compliance with 47 C.F.R. § 74.531(c) because his original application for WMG-499 specified that the Fort Lee translator then rebroadcast the signal of a noncommercial FM station in Franklin Lakes, New Jersey, and that WMG-499 would be used to feed 30-second announcements concerning financial support pursuant to 47 C.F.R. § 74.1231(g) and operational communications from the FM station to the translator.

ALJ also found that their testimony "was squarely contradicted on all significant points" by credible testimony from other witnesses. Moreover, the ALJ found, the discredited witnesses did not have engineering training or personal knowledge of the equipment and facilities in question. I.D., ¶¶ 191-92. We have reviewed the evidence and determined that the ALJ's conclusions are amply supported by the record. Accordingly we affirm the ALJ's resolution of this issue.<sup>16</sup>

**B. 47 C.F.R. § 74.1232(d)**

83. In its exceptions, Universal argues that the ALJ should not have granted renewal of Turro's translator station licenses because Turro is in violation of 47 C.F.R. § 74.1232(d). In pertinent part, this rule provides that "[a]n authorization for an FM translator whose coverage contour extends beyond the protected contour of the commercial primary station . . . will not be granted to any person or entity having any interest whatsoever, or connection with a primary FM station." Universal contends that the ALJ's action fundamentally misconstrued the HDO, which found, according to Universal, that the relationship between Turro and Weis violated this rule provision.

84. In a further pleading, styled Renewed Petition for Extraordinary Relief and Issuance of an Order Requiring Turro to Come into Immediate Compliance with 47 C.F.R. § 74.1232 ("Renewed Petition for Extraordinary Relief"), Universal requests that the Commission issue an order in this proceeding directing Turro to cease violating 47 C.F.R. § 74.1232(d). Universal asks that we order Turro either (1) immediately to terminate his programming and other connections with WJUX, or (2) immediately to cease rebroadcasting WJUX on his translator stations. All of the other parties, including the Bureau, oppose Universal's Renewed Petition for Extraordinary Relief.

85. First, we deny Universal's exception. We disagree that the ALJ misunderstood the HDO and erred in renewing Turro's authorizations in spite of the requirements of 47 C.F.R. § 74.1232(d). There was no 47 C.F.R. § 74.1232(d) issue designated for hearing for the ALJ to consider. We made clear in the HDO that the ultimate determination in this proceeding of whether the public interest would be served by a grant of Turro's renewal applications was not to be based on any violation of 47 C.F.R. § 74.1232(d). In addressing this matter, we explained that, because 47 C.F.R. § 74.1232(d) prohibits Turro from having any interest or connection with WJUX apart from rebroadcasting its programming over his translator stations, and Turro is a party to the Network Affiliation Agreement, which is a further business relationship with WJUX, the Bureau correctly advised Turro by letter on April 5, 1996 that these relationships violate the rule. We went on to state:

With respect to this violation, however, we acknowledge that the Bureau issued

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<sup>16</sup> We also disagree with Universal's related assertion that Turro misrepresented with respect to his operation of WMG-499. In fact Turro consistently and candidly admitted in response to the Bureau's letter of inquiry and in his testimony that his relay station was used to transmit aural program material and telemetry from the Dumont studio to the Fort Lee translator. See I.D., ¶¶ 201-02, 286-87.

Turro a letter in 1991 which he may have construed to authorize his relationship with WJUX and Monticello. We agree with the Bureau that the 1991 letter was not so broad as to authorize what is now known to be the relationship between WJUX and the translators. We find Turro's contention to the contrary, however, is not unreasonable. Accordingly, we will not pursue in this proceeding any violation of Section 74.1232(d) that may have resulted from Turro's reliance on the 1991 letter.

HDO, 12 FCC Rcd at 6269 n. 13. In view of this determination, which is still valid, we reject Universal's contention and reaffirm that Turro's violation of 47 C.F.R. § 74.1232(d) is beyond the scope of the hearing and is not relevant in evaluating Turro's qualifications as a licensee.

86. Notwithstanding the express ruling in the HDO, Universal persists that Turro could not justifiably have relied on the Bureau's 1991 ruling because he procured the letter through misrepresentation and then preceded to depart from the terms of the Bureau's ruling. We disagree. For the reasons already stated in this opinion, we conclude that Turro did not engage in misrepresentation or lack candor with the Commission either in connection with obtaining the Bureau's 1991 declaratory ruling or in any of his subsequent actions involving the operation of his translator stations and his relationship with WJUX.

87. We also deny Universal's Renewed Petition for Extraordinary Relief.<sup>17</sup> By way of background, as we recited in the HDO and noted above, the Bureau advised Turro by letter dated April 5, 1996 that so long as one or both of his translators continue to rebroadcast WJUX's off-air programming, he must cease from having any interest in or connection with WJUX. Alternatively, the Bureau advised that so long as Turro continues to have an interest in or connection with WJUX, he must cease from rebroadcasting its programming over his translators. The Bureau afforded Turro sixty days to come into compliance with 47 C.F.R. § 74.1232. At the same time, the Bureau acknowledged that its 1991 letter advised Turro that his proposal would not be prohibited by the Commission's rules, but stated that its earlier letter contemplated a minimal connection between Turro and the primary station and did not anticipate the substantial relationship that Turro subsequently established with WJUX.<sup>18</sup>

88. In response to the Bureau's April 5, 1996 letter, on May 31, 1996, Turro filed an application to assign his translator licenses to a trust created for his benefit but controlled by a trustee, Stephen M. Gansler. In a June 5, 1996 letter, the Bureau authorized Turro to continue his stations' current program service during the pendency of the assignment application. On August 13, 1996, the Bureau ruled that Turro's assignment proposal did not comply with the April 5, 1996 directive -- largely because Turro retained an interest as the beneficiary of the proposed trust -- and

<sup>17</sup> In light of the issuance of this opinion, we also dismiss as moot Universal's simultaneously-filed Motion for Expedited Processing.

<sup>18</sup> In its 1991 letter, the Bureau adverted to subsection (e) of 47 C.F.R. § 74.1232, governing financial support of translators by primary stations, but did not cite subsection (d) of the rule, prohibiting any connection between persons owning translators and primary stations. See ¶ 4, supra.

it ordered Turro to state what further steps he would take to achieve compliance. Gerard A. Turro, 11 FCC Rcd 22346 (1996). On September 6, 1996, Turro requested the dismissal of that assignment application, and we granted this request in the HDO. On the same date, Turro filed a new application to assign his translator stations to Press Broadcasting, Inc. In the HDO, we stated that we would hold this application in abeyance pending the resolution of the designated hearing issues. There the matter stands.

89. We will not grant Universal's request that we order Turro to comply with 47 C.F.R. § 74.1232(d) by immediately terminating his connection with WJUX or ceasing to rebroadcast its signal. As explained in the HDO, and confirmed in this decision, because Turro's understanding of the Bureau's 1991 ruling was not unreasonable, we decided not to pursue in this proceeding any violation of Section 74.1232(d). Moreover, we believe this result is further supported by the recent opinion of the court of appeals in Trinity Broadcasting of Florida, Inc. v. FCC, No. 99-1183 (D.C. Cir. May 5, 2000). There the court vacated the Commission's denial of renewal of a broadcast license because the Commission had failed to give fair notice of the requirement upon which the denial was based. Similarly, in this case, Turro was not afforded adequate notice in 1991 in response to his request for a declaratory ruling that his proposed time brokerage arrangement would be violative of Section 74.1232(d), and it therefore would be inappropriate to impose a sanction upon him based on this violation.

90. It now appears that Turro is attempting to come into compliance with the rule and the Bureau's April 1996 directive by assigning his licenses to Press. Indeed, from the time he was informed of the Bureau's revised understanding of the prevailing law in April 1996, Turro has timely sought to comply by assigning his licenses. According to Turro, he is currently proposing an "unconditional sale" of his translators to Press (Opposition to Renewed Petition for Extraordinary Relief at 6), a transaction that presumably contains none of the objectionable features of the trust arrangement previously proposed by Turro and rejected by the Bureau. As such, grant of the pending assignment application may well moot any remaining question of Turro's rule compliance. As noted, we have held this assignment application in abeyance pending completion of this hearing proceeding, and we believe that the pending assignment application is the appropriate context for resolution of this matter. Accordingly we direct the Bureau to consider, on the basis of its review and disposition of Turro's assignment application, whether any further action is required to accomplish full compliance with our translator rules.

## VI. CONCLUSIONS AND ORDERING CLAUSES

91. We conclude that neither Turro nor Monticello engaged in an unauthorized transfer of control of WJUX, that Monticello fundamentally complied with the rules governing the maintenance of a main studio for WJUX, that Turro did not misrepresent or lack candor to the Commission concerning the operation of his translator stations, that Monticello did not misrepresent or lack candor to the Commission concerning the operation of WJUX, and that the ALJ correctly resolved the issue of Turro's compliance with the rules governing the operation of translator stations. Therefore, we conclude that the public interest will be served by a grant of Turro's applications for renewal of his translator licenses, and that Monticello possesses the

requisite qualifications to be and remain a Commission broadcast permittee.

92. ACCORDINGLY, IT IS ORDERED That the Motion for Expedited Processing filed October 20, 1999 by Universal Broadcasting of New York, Inc. IS DISMISSED; and that the Renewed Petition for Extraordinary Relief and Issuance of an Order Requiring Turro to Come into Immediate Compliance with 47 C.F.R. § 74.1232 filed October 20, 1999 by Universal Broadcasting of New York, Inc. IS DENIED.

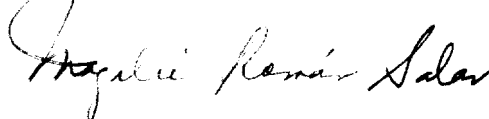
93. IT IS FURTHER ORDERED That the applications of Gerard A. Turro for renewal of license for FM translator stations W276AQ(FM), Fort Lee, New Jersey, and W232AL(FM), Pomona, New York (File Nos. BRFT-970129YC and BRFT-970129YD), ARE GRANTED.

94. IT IS FURTHER ORDERED That the construction permit of Monticello Mountaintop Broadcasting, Inc. for FM radio station WJUX(FM), Monticello, New York, IS NOT REVOKED.

95. IT IS FURTHER ORDERED That the application of Monticello Mountaintop Broadcasting, Inc. for a license to cover the construction of WJUX's facilities (File No. BLH-941031KD) IS GRANTED.<sup>19</sup>

96. IT IS FURTHER ORDERED That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas  
Secretary

<sup>19</sup> In the HDO, 12 FCC Rcd at 6265 ¶ 3, we incorporated herein Monticello's application for a license to cover its construction permit for disposition in accordance with the outcome of this proceeding.